

1 that. It's not something that sitting here
2 today I know the answer to.

3 Q That is a pretty astounding number
4 for a start up isn't it?

5 A It's a very significant number.

6 Q Do you know how Comcast - how the
7 MLB channel got right out of the gate 50
8 million subscribers?

9 A Well, they couldn't do it all with
10 Comcast because Comcast doesn't have that many
11 subscribers. So I'm not precisely sure which
12 of the MVPDs carry MLB channel today.

13 Q Do you know that they did it by
14 selling themselves to Comcast and to other
15 MVPDs?

16 A My understanding is that there is
17 a joint venture between DIRECTV, Cox, Time
18 Warner and Comcast that owns a minority share
19 of the MLB channel, and the majority share is
20 owned by the MLB itself.

21 MR. SCHMIDT: Let me, if I may,
22 mark for identification -- actually, I guess

1 this is an exhibit already. Let me pass it
2 up, if I may, Your Honor, Enterprises Exhibit
3 144.

4 JUDGE SIPPEL: Enterprises 144.
5 It's in evidence?

6 MR. SCHMIDT: It's in evidence.

7 JUDGE SIPPEL: Pass it up, please.

8 MR. SCHMIDT: And while I'm
9 passing it up, I'll -

10 JUDGE SIPPEL: Thank you.

11 MR. SCHMIDT: You're welcome, Your
12 Honor. This is an article from the New York
13 Times dated October 3rd, 2008.

14 JUDGE SIPPEL: 2008.

15 BY MR. SCHMIDT:

16 Q Do you see that this discusses the
17 MLB channel?

18 A I'm reading it, so -

19 Q I'll direct your attention. What
20 I'd like to direct your attention to is the
21 third page, the second -- I'm sorry, the first
22 full paragraph. Do you see where it says,

1 "Thanks to negotiations, the MLB Network will
2 begin with an endowment of more than 50
3 million subscribers." Do you see that?

4 A I see that.

5 Q It goes on to say, "Baseball is
6 swapping one-third ownership to this channel
7 with DirecTV, Comcast, Time Warner, and Cox
8 for wide distribution; thus, avoiding the kind
9 of ongoing distribution turf wars that the NFL
10 Network is having with big cable." Do you see
11 that?

12 A Yes, and I also believe the price
13 is much lower than that.

14 Q What is the price?

15 A I believe it's [REDACTED], is what
16 I've seen.

17 Q Have you analyzed that?

18 A Well, I've considered that it's [REDACTED]
[REDACTED] versus the other prices of other
20 channels.

21 Q Have you done any economic
22 analysis of whether that's the right price, or

1 the wrong price for MLB?

2 A Well, one way to -- in economics
3 there's a concept of revealed preference.
4 It's a concept that Paul Samuelson, who won
5 the Nobel Prize, wrote about, I believe in the
6 1930s, actually. And, so one can look at the
7 behavior of non-vertically integrated entities
8 and ask the question of how they carry the
9 program. And, so one would want to do that
10 with regard to the MLB Network.

11 Q Like DirecTV?

12 A DirecTV is vertically integrated.

13 Q They're on this list.

14 A Yes, they are. But they're also
15 vertically integrated.

16 Q Okay. So you would want to look
17 at non-vertically integrated -

18 A I would want to look -- as I
19 discussed, you'd want to look at all of the
20 MVPDs, all the major ones, and see how they're
21 carrying it.

22 Q You would want to include DirecTV,

1 though. Right? That's what you're including
2 here, isn't it?

3 A Again, I go back to what I said.
4 You start with the full list, look at them,
5 and then you consider which ones should
6 potentially get more weight than others.

7 Q Okay. And my question was simpler
8 than that. My question was simply, do you
9 look at DirecTV?

10 A Well, I would, again -- for the
11 same reasons identified before, one would want
12 to consider whether if DirecTV did not have an
13 ownership stake in the MLB channel, whether
14 they would carry the MLB channel in the same
15 way, whether it was part of a bundled product.

16 Q Have you looked at that?

17 A That's not something I've
18 considered.

19 Q Have you looked at any of that
20 with respect to the MLB channel?

21 A No, I've been focused on the NFL
22 Network.

1 Q Okay. But you don't have any
2 reason to question the fact that MLB is
3 beginning with 50 million viewers, and that it
4 has given up a third of its equity to the big
5 cable companies listed in this document. Do
6 you have any reason to question those facts?

7 A I do not.

8 Q Do you remember at your deposition
9 you used a term called "must have
10 programming." And, to be fair to you, it was
11 a term you said you didn't like.

12 A Precisely.

13 Q But it was a term you had used in
14 earlier testimony. Right?

15 A With quotes around it every single
16 time.

17 Q With quotes around it. And I
18 think what you said is, it's a term that's
19 used in the industry, but it's one you don't
20 like.

21 A Yes.

22 Q Okay. As that term is used in the

1 industry, must-have programming, that's
2 programming like ESPN. Right?

3 A I would put ESPN in the category
4 of must-have programming.

5 Q Okay. And when I asked you in
6 your deposition, you said that Versus is not
7 must-have programming. Do you recall that?

8 A Correct.

9 Q And Golf channel is not must-have
10 programming. Correct?

11 A Correct.

12 Q When you had your prior testimony
13 about what must-have programming is, you said
14 must-have programming is programming that is
15 able to command a relatively high license fee,
16 because the carriage of such programming is
17 especially value to MVPDs, so that's must-have
18 programming?

19 A I think that's a fair definition
20 of it; although, with the caveat that I don't
21 like using the term must-have, and I think I
22 had a footnote that said that.

1 Q I was careful to say that.

2 A No, I understand.

3 Q Are you aware that Versus and the
4 Golf channel have actually suffered drops in
5 their distribution?

6 A I'm aware that there have been a
7 number of MVPDs who have said that they desire
8 to, at various point, tier either Versus and
9 Golf, and Comcast acting in its own interest,
10 provided concessions in some way to either
11 maintain Versus and Golf on the tier that they
12 were on, or if they didn't, perhaps it was
13 tiered.

14 Q Respectfully, sir, that wasn't the
15 question I asked. The question I asked was
16 are you aware that they have actually been
17 dropped by certain MVPDs?

18 A Sitting here today, I'm not aware
19 of that.

20 Q Are you aware that they've lost
21 subscribers?

22 A I think they've gained -- I

1 thought they had gained subscribers looking
2 over time.

3 MR. SCHMIDT: Okay. Let me show
4 you another exhibit, what's been marked for
5 identification -- if I may approach, Your
6 Honor.

7 JUDGE SIPPEL: You may.

8 MR. SCHMIDT: As NFL Enterprises
9 Exhibit 208.

10 (WHEREUPON, THE DOCUMENT REFERRED
11 TO WAS MARKED AS NFL ENTERPRISES
12 EXHIBIT 208 FOR IDENTIFICATION.)

13 JUDGE SIPPEL: This is already in
14 as Enterprises 208?

15 MR. SCHMIDT: This is not in.

16 JUDGE SIPPEL: This is not in.
17 Okay.

18 MR. SCHMIDT: Marked for
19 identification. It is a Comcast document,
20 Bates label COM NFL FCC 4806-4808.

21 JUDGE SIPPEL: All right. And you
22 want to identify what it is? Date, and from

1 who, to who?

2 MR. SCHMIDT: It's an email chain,
3 and if you'll look along with me, Mr. Orszag,
4 the first email is from someone named Ted
5 Harbert at Comcast.net dated January 29th,
6 2008 to a number of people, including Jeff
7 Shell, who you've identified before. Right?

8 THE WITNESS: Yes.

9 BY MR. SCHMIDT:

10 Q And if you look at the email
11 chains, it's other Comcast employees, or
12 people at Comcast channels. Right?

13 A I have no -- I don't know who
14 these people are, but I won't disagree with
15 you.

16 Q Okay. What I'd like to direct
17 your attention to -

18 JUDGE SIPPEL: Well, the document
19 is identified as Enterprises Exhibit 208.

20 MR. SCHMIDT: Why don't I go ahead
21 and move it into evidence, Your Honor.

22 JUDGE SIPPEL: Any objection?

1 MR. TOSCANO: No objection.

2 JUDGE SIPPEL: It's received.

3 (WHEREUPON, THE DOCUMENT REFERRED
4 TO, PREVIOUSLY MARKED ENTERPRISES
5 EXHIBIT NO. 208 FOR
6 IDENTIFICATION, WAS RECEIVED IN
7 EVIDENCE.)

8 BY MR. SCHMIDT:

9 Q If you look at the bottom, the
10 first email - let me make sure I've got this
11 right - the first email in the chain is dated
12 January 29th, 2008 at 10:47. Do you see that
13 one?

14 A I just want to start on the one
15 that seemed earlier than the 12:10 p.m., but
16 I'm not sure -

17 Q You're right. I don't understand
18 that either. Sometimes they print the date
19 wrong. The first email is from Robert Boris.
20 Right?

21 A Yes. I don't know who Robert
22 Boris is. I'm sorry.

1 Q Do you see where it says, "VP Ad
2 Sales Research at Comcast Network"?

3 A Oh, I do see the next page.

4 Q And he writes to Mr. Whitely, who
5 responds with some data based on Nielsen
6 Universe Estimate Issues. Do you see that?

7 A Yes.

8 Q What I'd like to direct your
9 attention to is on the second page of the
10 email, the second bullet point.

11 A So this is the one starting,
12 "Comcast Networks"?

13 Q Yes. Bear with me just one
14 second. On the second page of the email, in
15 the second bullet point, do you see where it
16 says, "Comcast Networks lost an average of
17 [REDACTED] households, while non-Comcast Networks
18 gained [REDACTED] on average." Do you see that?

19 A Yes, I do.

20 Q And then in the next bullet point
21 it says, "Golf, Style, Versus, and G4 were all
22 among the top 10 networks losing the most

1 household distribution." Do you see that?

2 A I do, but I'm not sure if this is
3 measuring number of subscribers, or some form
4 of ratings. Nielsen is a company that does
5 ratings, and this is not an area of particular
6 expertise of mine, but I know that Nielsen
7 ratings measure viewers, and subscribers are
8 a different measure. So, sitting here, I do
9 not know what the Nielsen Universe Estimates,
10 whether they're a ratings estimate, or whether
11 they are a measure of the number of actual
12 paying -- of subscribers that a MVPD is paying
13 to Comcast.

14 Q Well, let me ask you. My
15 understanding of what Universe Estimate is,
16 and the FCC lawyer to my left will correct me
17 if I'm wrong, is that the universe estimate is
18 an estimate of the universe of viewers who
19 have access to the channel. Do you have a
20 different understanding?

21 A It's not something I have studied,
22 so I can't sit here and tell you one way or

1 the other. I'm sorry.

2 Q Have you ever heard that Golf and
3 Versus were among the top 10 networks losing
4 household distribution?

5 A Again, I am answering it as, I
6 know that Golf and Versus have expanded the
7 number of subscribers they have had over the
8 last 15 years. And whether they have lost
9 viewers in a quarter, if this is measuring
10 viewers, is not something sitting here I know.

11 Q This was never a document you saw?

12 A This specific document I do not
13 believe I've ever seen.

14 Q If you skip up to the top of the
15 document where Mr. Harbert writes, "Death to
16 the infidels." Do you know who that is? Is
17 that the independents?

18 A I have no idea.

19 Q You mentioned some big cable
20 companies that don't carry the NFL Network.
21 Right?

22 A Correct.

1 Q And there are cable companies, to
2 be sure. Right?

3 A That is correct.

4 Q They're not satellite companies.

5 A There's only two satellite
6 companies.

7 Q They're not telco companies,
8 telephone companies.

9 A There are two major telephone
10 companies.

11 Q And they carry the NFL Network.

12 A Yes, they do.

13 Q Okay. What I'd like to do is put
14 in front of you, if you would, that pie chart
15 you did.

16 A Yes.

17 Q Exhibit 603.

18 A Yes.

19 Q Where you said only [REDACTED] of
20 subscribers get the NFL Network.

21 A Non-Comcast, non-DirectTV
22 subscribers.

1 Q And that's exactly where I'm
2 going. You took out DirectTV. Right?

3 A Yes, I did.

4 Q You don't deny that DirectTV
5 subscribers have access to the NFL Network, do
6 you?

7 A No, I don't. And I think I
8 explained quite clearly that I just do not
9 know -

10 Q Understood. It's a very limited
11 question.

12 A Okay.

13 JUDGE SIPPEL: Easy. Let's slow
14 down a bit.

15 BY MR. SCHMIDT:

16 Q Do you know how the pie chart
17 would grow if you added in DirectTV?

18 A I could do it roughly in my head.

19 Q Let me help you.

20 A Okay.

21 Q We tried to do it last night in
22 terms of taking -- you had very graciously

1 given us the data underlying this, we added
2 back in DirectTV, and I can't vouch for our
3 math, because I had a personal hand in it,
4 which means it's suspect, but I'm going to
5 give you my best effort, or her best effort.

6 MR. SCHMIDT: If I may approach?

7 JUDGE SIPPEL: Yes, you may.

8 MR. SCHMIDT: We'll mark this for
9 identification as Enterprises Exhibit 300.

10 JUDGE SIPPEL: 300. This will be
11 marked for identification as Enterprises 300.

12 (WHEREUPON, THE DOCUMENT REFERRED
13 TO WAS MARKED AS ENTERPRISES
14 EXHIBIT 300 FOR IDENTIFICATION.)

15 JUDGE SIPPEL: What is it? Can
16 you describe what this document is then, Mr.
17 Schmidt, for the benefit of the witness, and
18 all of us?

19 MR. SCHMIDT: Yes. Mr. Orszag,
20 this is our best effort to take the data you
21 gave us underlying Comcast Exhibit 603, and
22 add back in DirectTV, which you took out. And

1 I may have asked you this already, and I'm
2 sorry if I did.

3 BY MR. SCHMIDT:

4 Q You don't deny that DirecTV
5 customers get the NFL Network, do you?

6 A No, I do not.

7 Q And, so, does what I've marked for
8 identification as Enterprises 300 appear to
9 represent what would happen to your Exhibit
10 603 if you added back in DirecTV?

11 A I'm trying to do this a little bit
12 in my head to make sure that you calculated it
13 roughly correctly. Let me take a moment.

14 Q Sure.

15 A It seems about roughly correctly.
16 But, for the reasons I've already identified,
17 I don't view DirecTV as a relevant benchmark.

18 Q Understood.

19 A Is not one that you can use for
20 market acceptance.

21 Q Now, what I'd like to do is show
22 you one more chart.

1 MR. SCHMIDT: We were having so
2 much fun with charts, we made another one,
3 which I'll mark for identification as
4 Enterprise 301.

5 JUDGE SIPPEL: Well, are you going
6 to move this one in?

7 MR. SCHMIDT: I will move in
8 Enterprise 300.

9 JUDGE SIPPEL: Any objection?

10 MR. TOSCANO: No objection.

11 JUDGE SIPPEL: It's received.

12 (WHEREUPON, THE DOCUMENT REFERRED
13 TO, PREVIOUSLY MARKED ENTERPRISE
14 EXHIBIT 300 FOR IDENTIFICATION,
15 WAS RECEIVED IN EVIDENCE.)

16 MR. SCHMIDT: Thank you. Now, I
17 tried to do something a little different.

18 BY MR. SCHMIDT:

19 Q You said you took out both Comcast
20 and DirecTV.

21 JUDGE SIPPEL: I'm sorry. What
22 number are you giving this one, 301?

1 MR. SCHMIDT: 301, sir.

2 JUDGE SIPPEL: Enterprise 301 for
3 identification.

4 (WHEREUPON, THE DOCUMENT REFERRED
5 TO WAS MARKED AS ENTERPRISE
6 EXHIBIT 301 FOR IDENTIFICATION.)

7 JUDGE SIPPEL: And why don't you
8 explain what this is supposed to be?

9 MR. SCHMIDT: Well, in 300, we
10 added back in DirectTV. In 301, what we've
11 tried to do is we've said what would it look
12 like if DirectTV were included, and if Comcast
13 carried the NFL Network on the same terms that
14 it carries its own affiliated sports channels,
15 Versus and the Golf channel. And this is what
16 we generated from doing that.

17 THE WITNESS: You said "same
18 terms." I just want to be careful. You mean?

19 MR. SCHMIDT: Same penetration.

20 THE WITNESS: Yes, because it's
21 obviously not the same price.

22 MR. SCHMIDT: Same penetration.

1 BY MR. SCHMIDT:

2 Q And understanding that I'm asking
3 you to do this on the sly, do you have any
4 reason to question that the numbers would come
5 out in this fashion?

6 A If you add [REDACTED] basic,
7 expanded basic subscribers to the number, it
8 wouldn't surprise me, but I think we
9 understand the assumptions that are embedded
10 in here, and what you're making.

11 Q And, so, if you compare Exhibit
12 300 and Exhibit 301, which I will, Your Honor,
13 move into evidence, if I may.

14 MR. TOSCANO: We don't object to
15 it being admitted, although, we do object to
16 the idea this is created by lawyers. We're
17 not signing off on the math that is -

18 MR. SCHMIDT: And that's
19 absolutely fair, Your Honor.

20 JUDGE SIPPEL: It's only what it
21 purports to be.

22 MR. SCHMIDT: Especially given

1 that I had any hand in the math. That's
2 absolutely -

3 JUDGE SIPPEL: I.D. 301, so this
4 is Exhibit 301, Enterprise. It's been
5 identified, and now it's received as 301.

6 (WHEREUPON, THE DOCUMENT REFERRED
7 TO, PREVIOUSLY MARKED ENTERPRISE
8 EXHIBIT 301 FOR IDENTIFICATION,
9 WAS RECEIVED IN EVIDENCE.)

10 JUDGE SIPPEL: And would you
11 explain once more, again, what you added in?
12 I understand what 300 is.

13 MR. SCHMIDT: Yes.

14 JUDGE SIPPEL: You added in
15 DirecTV.

16 THE WITNESS: What they did was
17 they assumed that the remedy were put in
18 place, and that Comcast carried NFL Network on
19 expanded basic.

20 JUDGE SIPPEL: At the price that
21 we're talking about in here, the [REDACTED]
22 price?

1 THE WITNESS: At any price.

2 JUDGE SIPPEL: Oh, any price.

3 THE WITNESS: Price is ignored in
4 this chart.

5 BY MR. SCHMIDT:

6 Q So, adding Comcast in, with
7 Comcast carrying the NFL Network at the same
8 level of penetration that it carries its
9 affiliated channels, Versus and the Golf
10 channel, pushes the NFL Network well over [REDACTED]
[REDACTED], doesn't it?

12 A If you've done your math
13 correctly, but I'm not sure why it's really
14 relevant.

15 Q Okay.

16 MR. SCHMIDT: If I may, I want to
17 try one last exercise, and this will exhaust
18 my -- Your Honor, may I just use the Dry Erase
19 Board?

20 JUDGE SIPPEL: Whatever it is, you
21 may use it, as long as everybody can see what
22 it is.

1 THE WITNESS: Are you going to
2 write Florida, Florida, Florida on there?

3 (Laughter.)

4 MR. SCHMIDT: No.

5 BY MR. SCHMIDT:

6 Q Let me ask you just to list for
7 me, and consult with your documents there, if
8 you need to. What are the -- I believe
9 there's six or seven, the six or seven big
10 cable companies that you cite that don't carry
11 the NFL Network?

12 A Well, we can start with Cox
13 carries it on tier.

14 Q I'm asking ones that don't carry
15 it.

16 A I'm sorry.

17 Q The ones you said that don't carry
18 it.

19 A Time Warner does not carry it.
20 Cablevision does not carry it. Charter does
21 not carry it. Bright House does not carry it.
22 Sudden Link does not carry it.

1 Q You're going fast. I'm sorry.

2 A I'm sorry.

3 Q Cablevision, Charter.

4 A If you'd like to look at the

5 chart, we can -

6 Q Bright House?

7 A Bright House, Sudden Link,

8 Mediacom.

9 Q And it's those six?

10 A Well, those are the six that have

11 more than a million subscribers. If you go

12 below a million subscribers, you would have

13 hundreds of cable companies that don't carry

14 it. Actually, I believe it would be in the

15 range of -- it would be over a thousand.

16 Q Those are the six you cited in

17 your past memo.

18 A Yes.

19 Q And this I won't ask you to do by

20 memory. You recall that there were cable

21 companies, or MVPDs, rather than Dr. Singer

22 looked to in performing his regression